EXHIBIT 3
DATE 1/13/2009
HB 150

MONTANA TRIAL LAWYERS ASSOCIATION

JUSTICE FOR ALL

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Representative Ron Stoker, Chair
House Judiciary Committee

RE: HB 150

House Judiciary Committee Members:

Thank you for the opportunity to appear and testify in opposition to HB 150. We oppose HB 150 on the principle that you should not preemptively deprive all future Montanans of the right to exercise their constitutional right to a remedy for harm caused by another.

The Montana Trial Lawyers Association (MTLA) is a membership organization of primarily plaintiff lawyers - we're the ones everybody seems to love to hate, but the first ones that those same people call when they or a family member have had their lives devastated because of the wrong doing of a corporation, government or another individual. We're the ones who won you the tobacco settlement that brings millions into the state's coffers each year; and the ones who represent those whose lives have been devastated by W.R. Grace in Libby.

MTLA supports the basic, conservative, principle that individuals, corporations and governmental entities should be accountable and responsible for their actions or omissions that cause harm to another. This principle is set forth in Article II, Section 16 of our Montana Constitution which provides that "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character." This is a fundamental right guaranteed by our Montana Constitution, a fundamental right that you need a compelling interest to take away. There are no facts in support of HB 150 to form the basis of a compelling state interest, only speculation, at best, or a desire to avoid all litigation.

Let's look at the economic reality of litigation. First, trial lawyers make their money through contingency fee agreements - the injured person doesn't pay for the attorney's time, the attorney takes a calculated risk that she will win the case and then receive a percentage of the verdict as her pay. If trial lawyers don't win, they don't get paid for all the time and money they put into a suit. Attorneys don't stay in business very long if they take marginal or so-called frivolous suits. Also, if an attorney files a truly frivolous lawsuit they are personally subject to sanctions by the court, most often paying the costs and attorney fees of the other party. The risk of not getting paid for hundreds of hours of work, and/or of having to pay the opposing party's fees and costs, makes trial lawyers very carefully assess a potential case.

Even if a suit were filed, it is often difficult to win. The first legal hurdle is did the provider of a recreational activity have a duty to the injured person and was that duty breached? Assuming that hurdle was cleared, the injured person would have to prove that the injuries they suffered were actually caused by the negligence of the provider. Then, it would have to be proven that the negligence of the provider was greater than the personal responsibility of the person who is

injured - is the negligence of the provider greater than the negligence of the injured person. Contrary to popular belief, it is not easy to prove all those things.

Remember, a person doesn't just get money by filing a lawsuit, they have to prove it to a jury. Juries are ordinary Montanans, your constituents, the folks who elected you. Juries are just like you, they think people should be responsible and accountable for their actions. Do you really think that a jury would hold a provider liable for the simple risks that might be part of a recreational activity? Do you believe that juries of your constituents wouldn't carefully weigh the responsibilities of both parties? I don't think so, and most attorneys would not take the financial risk of such a case for a truly inherent risk of a recreational activity.

This bill has serious structural and policy problems. This bill has no inherent risks of these activities identified, and there are no duties and responsibilities for both the providers and participants in those activities. Look at the statutes for skiers or snowmobilers - inherent risks are defined, dutie and responsibilities are defined, but they are not in HB 150. It is an overly broad bill that makes no sense from a public policy or legal standpoint.

Most importantly, it will not reduce litigation - an inherent risk, especially if that term is not defined for a particular activity, is a fact question. That means the jury makes the determination if an inherent risk was the cause of injury, the case cannot be dismissed on a motion before it goes to trial.

Unlike in the movies and on TV, litigation is not rampant, AND it is a jury of peers from the community that judge these case. Suits for the simple inherent risks of recreational activities, are unlikely to be brought, or if brought, won. In 2003 a rafting company owner described an incident where a client was severely hurt by an "inherent risk" - a tree falling on the raft and hitting the man on the head. A lawyer investigated, but no lawsuit was filed, likely because the lawyer knew that no jury would hold a rafting business liable for a tree falling. That is the reality in Montana - suits are not filed for true inherent risks.

Reject HB 150 and leave it up to a jury of your constituents to hear all the actual facts from all the parties over a period of several days and then make a decision that fairly apportions responsibility. Do not pass HB 150 after a few minutes of speculative testimony and thereby deprive <u>all</u> future Montanans and our out of state guests, no matter their factual situation, of their constitutional rights and their day in court. Leave it in the hands of a jury - trust juries of your constituents to make the right and fair decision, if you can trust them to elect you, you can trust them to responsibly decide cases before them.

Thank you.

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